

Dialogue

Making *Leon* Worse

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In *Living with Leon*,¹ Professor Donald Dripps powerfully criticizes virtually every line of the Court's opinion in *United States v. Leon*,² and its "good faith" exception to the exclusionary rule. He persuades me that *Leon* is one of the weakest of the Court's criminal procedure opinions. But he also opines that *Leon* "poses only a minor risk of encouraging speculative search warrants"³ and that, properly interpreted, the "result" of *Leon* is not only defensible but consistent with the Fourth Amendment law that preceded it. Here we part. Professor Dripps' revision of *Leon* is even less defensible and more pernicious than the Court's own holding.

Professor Dripps contends that the high "costs of the warrant process," in the form of lost police time, are themselves sufficient to ensure that the police have probable cause to search.⁴ So long as these costs are maintained, a "good faith" exception will have no bite: There will be probable cause in all but an insignificant number of warrant searches and thus no need to consider the good faith of the police in executing an invalid warrant.⁵ He even posits that police effort in seeking the warrant should be treated not as evidence of "good faith," as the Court in *Leon* may have implied, but as evidence of probable cause itself.⁶ By this sleight of hand, the "good faith exception" vanishes and the exclusionary rule remains in

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1. Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986).

2. 468 U.S. 897 (1984).

3. Dripps, *supra* note 1, at 934.

4. *Id.* at 926.

5. *Id.* at 928-29.

6. *Id.* at 941-44.

full force during the prosecution's case-in-chief. No violations of the Constitution are condoned or left unsanctioned. Everybody should be happy.⁷

I. A DIFFERENT VIEW OF THE EVIDENCE

The argument rests largely on a study for the National Center for State Courts (NCSC),⁸ which found that motions to suppress are rarely granted in search warrant cases and that evidence is seized in about three warrant executions in four. These data, Professor Dripps concludes, show that the police almost always have probable cause,⁹ whether or not it appears in the warrant application. I disagree.

A. *The Rare Success of Suppression Motions*

The NCSC study of seven cities found that in prosecutions where search warrants had been executed, motions to suppress were filed in only 39% of the cases, granted in only 12%, for an overall suppression rate of 5%.¹⁰ Professor Dripps seems to think that "the low suppression rate" indicates that "most warrants are validly issued."¹¹

There are a number of plausible explanations for the percentage of suppression motions filed, several of which have nothing to do with probable cause. Defense lawyers are often lazy or incompetent.¹² Others are more interested in currying favor with the police, the prosecutors, and the courts than in defending their clients. If nothing very incriminating or valuable is seized, as is often the case,¹³ there is little reason to file. Since the Court in 1978 put its *imprimatur* on searches of premises of persons who aren't even suspects,¹⁴ and has radically narrowed standing concepts,¹⁵ the defendants often lack standing to file a motion, regardless of the invalidity of the search. Because dismissals are rarely related to sup-

7. *Id.*

8. R. VAN DUZAND, L. SUTTON & C. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* (1984) [hereinafter cited as NCSC STUDY].

9. See Dripps, *supra* note 1, at 925.

10. See NCSC STUDY, *supra* note 8, at 57.

11. Dripps, *supra* note 1, at 925.

12. See Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973); Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 FORDHAM L. REV. 1 (1980).

13. See *infra* text accompanying notes 50-58.

14. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

15. *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (defendant who was at party with girlfriend when search conducted could be convicted of possessing drugs illegally obtained from search of girlfriend's purse); *Rakas v. Illinois*, 439 U.S. 128 (1978) (passengers in car where shotgun found, charged with possessing the shotgun, had no protectable interest because it wasn't their car). It is thus quite possible for the prosecution simultaneously to claim that a person possessed something and that he had no possessory interest in it, and to win on *both* issues. See *United States v. Salvucci*, 448 U.S. 83 (1980).

pression issues,¹⁶ defendants who have hope of a dismissal (perhaps two-thirds of all defendants) have little reason to pursue suppression motions, at least until the dismissal efforts appear to be unsuccessful, which is the case less than half the time.¹⁷

The plea bargaining system may also deter the filing of marginal suppression motions: Anything that consumes prosecutorial or judicial time and is not successful in terminating the prosecution risks being retaliated against, in the form of a tougher prosecutorial plea bargaining stance or a stiffer sentence following conviction.¹⁸ Given the vagaries and rapid erosion of Fourth Amendment law, hardly any motion to suppress is clearly better than marginal. Finally, if defense counsel are persuaded that the courts are strongly biased against motions to suppress, and I don't know a criminal lawyer who lacks that perception, they may be demoralized, if not deterred, from filing motions. In light of all these explanations for failures to move to suppress, the fact that such motions *are* filed in nearly half the warrant cases is impressive.¹⁹

Nor does the fact that only 12% of the motions in the NCSC study were granted carry the weight that Professor Dripps apparently attributes to it. A large portion of the denials were doubtless based on issues other than the warrant's validity, e.g., that the accused had no "standing."²⁰ Also, many motions to suppress, mooted by a dismissal or guilty plea, are never ruled upon²¹ and cannot be counted as denials. The low rate of

16. See NCSC STUDY, *supra* note 8, at 101; Davies, *A Hard Look at What We Know (and Still Need to Learn) About the Costs of the Exclusionary Rule: The NIJ Study and Other Studies of Lost Arrests*, 1983 A.B. FOUND. RESEARCH J. 611, 679-80 (1983).

17. Zeisel reports that 44% of persons arrested for felonies in New York City are never convicted, and that the rate of dismissals is 60% in California, 40% in Portland, Oregon, 51% in Washington, D.C., and 63% in New Orleans. H. ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 19-21 (1982).

18. Offsetting this risk in part is the possibility that a motion to suppress, if it has *some* merit, may provide some plea bargaining leverage. Nardulli found that unsuccessful motions to suppress physical evidence increased the likelihood of a charge reduction by 20%, but that no reduction in sentences could be found to be so correlated. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B. FOUND. RESEARCH J. 585, 604-05. Other studies have found little plea bargaining value in suppression issues. Gilboy, *Guilty Plea Negotiations and the Exclusionary Rule of Evidence: A Case Study of Chicago Narcotics Courts*, 67 J. CRIM. L. & CRIMINOLOGY 89 (1976).

19. It is also worth noting that, in the NCSC study, only about a third of the search warrants lead to or could be connected to a prosecution. See *infra* text accompanying notes 50-54. There is thus neither the need nor opportunity to challenge most of the warrants, which presumably did not produce anything very important. This underside of the warrant process cannot hope to acquire any legitimacy from the statistics on suppression motions.

20. See *supra* note 15. A judge could also "deny" the motion "provisionally," hoping to nudge the accused into a plea bargain. And, since admitting inadmissible evidence is not reversible error if "harmless," a judge could deny the motion on the expectation that the denial would be converted, by other proof, into "harmless error."

21. Apparently, the majority of the suppression motions filed in the NCSC study were never even heard, much less ruled upon. NCSC study, *supra* note 8, at 100. Nardulli found that almost 14% of the motions to suppress physical evidence in his cases were never ruled upon. Nardulli, *supra* note 18, at 597.

granted motions may also reflect a lawless judiciary. Professor Dripps acknowledges this possibility but dismisses it.²²

The warrant practices described in the NCSC study are a litany of perversions of the Fourth Amendment. Many of the magistrates regarded themselves as adjuncts to law enforcement.²³ In 43% of the cases, magistrates reviewing warrant applications failed to ask even a single question.²⁴ When a question was asked, it was often answered by referring to something in the application, which implies that the magistrate asked the question as a substitute for reading the application.²⁵ A median time of 2.2 minutes was spent in the application process.²⁶ Shopping for rubber stamp magistrates was commonplace.²⁷ The applications almost always contained boilerplate.²⁸ Police sometimes sought and magistrates granted warrants that all knew were illegal, in order to get contraband "off the street"²⁹ or to harass somebody.³⁰ It is inconceivable that 95%, or even 80%, of these warrants were lawful.

The NCSC study itself supports the inference that lawlessness of reviewing judges accounts in significant measure for the rarity of successful suppression motions. The granters and reviewers are, after all, often the same judges.³¹ Judge Wilkey has asserted that judges "hypocritically" deny meritorious search and seizure motions because of their hostility to the exclusionary rule.³² There is other support for the claim.³³ It defies common sense and common experience to argue otherwise.

22. Dripps, *supra* note 1, at 924-25.

23. NCSC STUDY, *supra* note 8, at 64.

24. *See id.* at 31.

25. *Id.*; *see also id.* at 68.

26. *Id.* at 31. The mean time was two minutes forty eight seconds. Ten percent took a minute or less; only eleven per cent took more than five minutes. *Id.* Given the fact that the participants knew they were being observed by researchers, it is likely that even these times are inflated.

27. *See id.* at 27-30, 65-66. As was "prosecutor shopping." *Id.* at 69.

28. *Id.* at 71-73, 87.

29. *See id.* at 67, 99.

30. *Id.* at 99.

31. *Id.* at 28; L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 120 (1967).

32. He says that police lie to uphold a search and that a "judge will be inclined to 'believe' the officer, even if he well knows from all the surrounding circumstances the officer is lying." WILKEY, ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE 18-19 (1982). This inclination, which Judge Wilkey charitably calls "hypocrisy" is, he says, "virtually undeniable." *Id.* at 21. No one, so far as I know, has denied it. Apart from providing a partial explanation for the low success rate of suppression motions, Judge Wilkey's observation helps to explain the unpopularity of warrants among police. If the police commit themselves to what they are looking for before they conduct the search, their freedom to fabricate facts and circumstances is somewhat circumscribed. This is a "cost" that Professor Dripps does not include in his theory.

33. In Nardulli's study, defendants with no criminal record were three times as likely to have a motion to suppress physical evidence granted than were defendants with records. Nardulli, *supra* note 18, at 599, 601. Those accused of victimless crimes were two or three times as likely to have a motion granted as those charged with crimes against the person, *id.* at 599, and not a single case, among the 7767 analyzed, involved a granted motion to suppress such evidence where the charge was a *serious* crime against the person. *Id.* at 596 n.47. These data suggest that judges are reluctant to grant mo-

In any event, the very studies Professor Dripps cites are inconsistent with his argument. He thinks that the rarity of successful suppression motions is evidence of probable cause in most *warrant* searches.³⁴ But searches without warrant are even *less* likely to lead to suppression. In Nardulli's study of 7767 felony cases in nine counties in three states, fewer than 5% of the defendants filed motions to suppress physical evidence and only 14% of the motions were granted.³⁵ Thus, suppression motions were granted in only 0.7 of the total cases. A study of federal prosecutions found suppression motions granted in only 1.3% of a sample of 2804 cases.³⁶ Most of these cases surely involved searches of some kind,³⁷ and virtually all of them were without warrants.³⁸ The 5% suppression rate for warrant searches in the NCSC study, therefore, was about five times as great as suppressions in felony cases in general, most of which involved warrantless searches. I would hesitate to argue from these data that warrant searches are less likely to have probable cause than other searches,³⁹ but the data certainly weaken Professor Dripps' opposite conclusion, that the rare success of suppression motions reveals something unique about warrant searches that guarantees probable cause.⁴⁰

B. *The Supposed Accuracy of Warrant Applications*

The only other empirical argument advanced by Professor Dripps is the "surprising accuracy [of warrant applications] in predicting the location of criminal evidence," which he finds "strikingly impressive."⁴¹ He reasons that since the warrant search resulted in the seizure of evidence, in six of the seven cities in the NCSC study, 74% to 89% of the time, the most

tions made by serious criminals and that their reluctance results in denials of meritorious motions. See also *infra* note 40.

34. Dripps, *supra* note 1, at 923-24.

35. Nardulli, *supra* note 18, at 593-97.

36. REPORT OF THE COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (Rep. No. DCG-79-45) (1979).

37. I assume that virtually all felony charges involved an arrest of the accused and a search incident to that arrest or in connection with booking.

38. Cf. NCSC STUDY, *supra* note 8, at 19-20 (overwhelming majority of state criminal investigations conducted without use of search warrants). Indeed, the "vast majority of searches are conducted without a warrant." *Id.* at 21.

39. For further thoughts and data on this point, see *infra* notes 58 & 102.

40. The Nardulli study of suppression motions also reveals that rarity of success is not confined to motions to suppress physical evidence, presumably the subject of search and seizure. Motions to suppress identification evidence were filed in 4.8% of the cases and granted in only 1.6% of the cases in which motions were filed. Motions to suppress confessions were filed in 6.6% of the cases and granted in only 2.3% of those cases. Nardulli, *supra* note 18, at 595, 597. Thus, the success rate for these motions was much lower even than that for motions predicated on the Fourth Amendment. These data seem to demand explanations for the entire phenomenon of low suppression rates that have nothing to do with probable cause.

41. Dripps, *supra* note 1, at 925.

likely explanation for the low suppression rate is the "prevalence of sound warrant applications."⁴² Since the police were right in their suspicion that seizable evidence would be found in three quarters of their warrant searches, he reasons, they *must* have had probable cause in virtually every case.

This claim is even weaker than the previous one. It proceeds from a fundamental error about the Fourth Amendment's warrant clause. The "probable cause" required for a warrant is not a mere probability that *something* will be found. The Fourth Amendment requires a showing of probable cause to believe that a specified crime has been committed, that specified contraband, instrumentalities or evidence of *that* crime exists, *and* that the specified material is located in a specified place.⁴³

Consider, however, what was typically specified in the home warrants in the NCSC study: "Property tending to establish the identity of persons in control, care and maintenance of the premises to be searched, including but not limited to cancelled mail envelopes, utility bills, rent receipts, photographs and keys."⁴⁴ If such items do not exist in a home, the home is vacant. If no correspondence or documents tending to identify the occupants or owners of a house can be found, and it is not empty, it is likely to contain some cash, also commonly seized in the NCSC study,⁴⁵ or weapons, legal or illegal.⁴⁶ If none of these are present, there may be some

42. *Id.* Professor Dripps never says precisely what he means by "sound warrant applications," but he pretty clearly is referring to the mental state of the police, i.e., their "very high subjective expectation that evidence is to be found." *Id.* at 926. He thus treats as virtually irrelevant what is actually contained in the warrant application, regarding the costs of the warrant process as an ensurer of the high subjective expectation that he equates with "sound warrant applications." It is puzzling, therefore, that he condemns courts that find a warrant search valid because the police had probable cause which was not all set forth in the application. *Id.* at 926 n.85. He seems to be doing the same thing.

43. See 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(d), at 705; § 3.1, at 444 (1978); *Jones v. United States*, 362 U.S. 257, 270 (1960); *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

In overlooking the first part of the probable cause requirement, Professor Dripps is not alone. See *Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 711-12 (1972); MODEL CODE OF PREARRAIGNMENT PROCEDURE § 220.1(5) (American Law Institute 1975); MCCORMICK ON EVIDENCE 473-74 (3d ed. 1984). Indeed, there is language in *Illinois v. Gates*, 462 U.S. 213, 236 (1983), that, if taken out of context, is supportive: The Fourth Amendment "requires no more" than a "substantial basis" for concluding "that a search would uncover evidence of wrongdoing." If that were the law, however, the Fourth Amendment would be virtually without content. See *infra* note 47.

The Court's extension in *Warden v. Hayden*, 387 U.S. 294, 300 (1967), of the scope of a permissible search to include "mere evidence" is accountable for some of this confusion. Although "mere evidence" may be sought, it may not be sought lawfully without probable cause that is specific to the crime suspected, the evidence expected, and the relationship between the two.

44. NCSC STUDY, *supra* note 8, at 80. Such documents were seized in 45% of the searches. *Id.* at 54. Similar boilerplate was contained in warrants for automobile searches. *Id.* at 80.

45. Cash was seized in 9% of executions. *Id.* at 53.

46. Weapons were seized in 23% of executions. *Id.* It has been estimated that about half the homes in the United States contain firearms.

literature arguably related to crime, such as books or articles about drugs, also commonly specified in NCSC warrants.⁴⁷ That police failed to seize something in *every* case is quite remarkable.⁴⁸ The fact that material was seized has no bearing whatever on the existence of probable cause. As one policeman put it, they usually seize “something,” if only to “protect the ‘reliability’ of an informant.”⁴⁹

The NCSC study also contains some other data that undercut Professor Dripps’ conclusions based upon the fruits of warrant searches. In six of the seven cities studied, criminal charges were filed in fewer than 48% of the searches for which returns were filed.⁵⁰ In one city, only 25% of the searches could be connected to criminal charges.⁵¹ The average for the six cities was 39%.⁵² Adjusting downward for the fact that warrants were executed for which returns were not filed,⁵³ the average was about three warrants for one connected case.⁵⁴ If, as Professor Dripps assumes, police who undertake the “costs” of the warrant process are almost invariably seeking evidence with which to prosecute a criminal, why is it that they seem to fail in two tries out of three?

The obvious explanation is that the police in fact failed to find what they hoped to find in a large number, if not the majority, of their warrant searches. The only other plausible explanation is that prosecutors declined to charge in many cases, even though the police found what they were

47. *Id.* at 80. There is “evidence of crime,” loosely defined, in every home. Indeed, there is probably “crime” in nearly every home. Teenagers’ use of drugs, alcohol, and tobacco is widespread. A recent study concluded that 38% of Americans commit income tax evasion. Arizona Republic, April 14, 1986, at C7. Zoning, health, and safety regulations, many of which call for criminal penalties, are commonly violated, as are statutes against “obscene” literature and films and “unnatural” sex practices.

48. In one of the cities in the NCSC study, no returns were even filed in 46% of the warrants, which the authors took as evidence that nothing was seized in those warrant executions. NCSC STUDY, *supra* note 8, at 46.

49. *Id.* at 96. This is a euphemism for seizing something so that the informant can be credited in future warrant applications with having provided “reliable information” in the past. In 60% of the informer-based warrants in the NCSC study the applicants asserted that information from the informant “resulted in seizures” in the past. *Id.* at 76. Thus, many of the seizures were motivated by nothing more than a desire to manufacture “probable cause” in future cases. If Professor Dripps were able to persuade courts that the seizure of evidence is itself proof of probable cause, police would certainly seize *something* in every search. Instead of having what Professor Dripps regards as a “successful search” in 74% to 89% of the cases, *see id.* at 925, they would then have a “success rate” of 100%, *see id.* at 925 n.116. Professor Dripps would then argue, presumably, that there was *certain* cause in every case and thus no need whatever for judicial review.

50. NCSC STUDY, *supra* note 8, at 55.

51. *Id.*

52. These were 386 warrants for which returns were filed and 150 prosecutions to which they could be connected. *Id.*

53. *Id.* at 46.

54. The seventh city is not included in these aggregates, or in the data relied upon by Professor Dripps, because returns were generally not filed unless materials were seized. In that city a warrant could be connected to a criminal charge in about 43% of the cases. NCSC STUDY, *supra* note 8, at 139. The mean percentage of warrants issued in which at least one charge was filed was 34.5% for the six cities and 35.7% for all seven. *Id.*

looking for and had a prosecutable case. That possibility, however, can be dismissed. Prosecutors were involved in reviewing, preparing or presenting most of the warrant applications in the NCSC study.⁵⁵ That review and approval implies that the prosecutors regarded the crimes suspected, if any, as appropriate ones for criminal charges, provided they could be proved.⁵⁶

Criminal charges appear commonly to be filed in state courts without anything resembling proof beyond reasonable doubt. Probable cause will suffice to bind a defendant over for trial, and a dismissal rate of 40% to 60% suggests that probable cause—or even a lesser standard—is the predominant threshold for the filing of criminal charges.⁵⁷ Yet even this weak threshold was apparently not met in two cases out of three in which a warrant was executed. If probable cause did not exist *after* the search, how could it have existed *before* the search?

If Professor Dripps had some data indicating that warrant searches usually result in the seizure of highly incriminating evidence that is causally related to a criminal charge or, better, to a conviction, he would have some interesting data. But it is very unlikely that any such data exist. In fact, yet another finding of the NCSC study points in the opposite direction. In 70% of the prosecutions in which motions to suppress were granted, the defendants were convicted anyway, suggesting that what is seized in warrant searches is usually of marginal relevance.⁵⁸ Cases are not only rarely “lost” by suppression motions, they are also rarely “made” by warrant searches.

Probable cause for a search does not, of course, require that anything important to a prosecution be sought by the search. But if Professor Dripps is right that warrants are very “costly” and the police are almost always seeking to make or strengthen a case, the apparent rarity with which their presumed expectations are met calls into question their expertise and their motives, both of which Professor Dripps’ argument does not question. It might be posited that the police routinely have a lot more than

55. *Id.* at 24–25, 55.

56. Nor would problems with the search account for the data. Prosecutors almost never decline to prosecute because of doubts about the legality of a search. *Id.* at 134; Davies, *supra* note 16, at 640; REPORT OF THE COMPTROLLER GENERAL, *supra* note 36, at 14 (search and seizure problems were primary reason for declining to prosecute in “only about 0.4 percent of the total declined cases”).

57. See *supra* note 17.

58. NCSC STUDY, *supra* note 8, at 56. If the defense is motivated to press a suppression issue to decision, the evidence involved in the motion is usually far more damaging to the defense than seized evidence in general. I therefore infer that searches which did not result in prosecutions or in suppression motions were even less productive, on the whole, than those covered by suppression decisions.

In contrast to the NCSC findings, Nardulli’s study found that only about 22% of defendants whose motions to suppress physical evidence were granted were convicted. Nardulli, *supra* note 18, at 600–01. This suggests that searches incident to arrest may be more likely than warrant searches to produce important incriminating evidence, and thus undermines Professor Dripps’ thesis.

probable cause prior to the warrant application and the fact that their case is so strong before the search accounts for the apparent insignificance, in relative probative strength, of what they find. But this possibility is belied not only by the fact that no prosecution results two-thirds of the time⁵⁹ but by the contents of most warrant applications themselves.⁶⁰ It is an utterly implausible hypothesis.⁶¹

II. POSSIBLE CAUSES OF SOUND WARRANTS

Although the data provide no support for his thesis, Professor Dripps *could* still be right. A proposition of law rarely rests on unimpeachable data. It may be worthwhile, therefore, to examine the plausibility of Professor Dripps' thesis, independent of the data on which he relies.

For the inference that most warrants are "soundly based," Professor Dripps poses two possible explanations. First, the risk of exclusion prior to *Leon* led the police to be extra-cautious in applying for warrants, seeking them only when they had highly probable cause.⁶² Second, the labor costs of getting the warrant are so high that the police only resort to warrants when they are practically certain of cause.⁶³ Professor Dripps rejects the first explanation and embraces the second. I too reject the exclusionary rule as a source of sound warrants, but I also reject the second explanation, leaving me with the conclusion that most search warrants, even prior to *Leon* and *Gates*, were "unsound."

A. *The Exclusionary Rule Explanation*

Although he thinks that the exclusionary rule deters marginal searches,⁶⁴ Professor Dripps discounts the rule, prior to its curtailment by *Leon*, as a source of sound warrants. He reasons that if the threat of exclusion were the only deterrent to warrant searches, police would make many more dubious searches than they do, because the only risk they would run is loss of the evidence.⁶⁵

The fact that only about 1% of felony prosecutions, even before *Leon* and *Gates*, were "lost" due to suppression of physical evidence⁶⁶ suggests

59. See *supra* text accompanying note 54.

60. See, e.g., NCSC STUDY, *supra* note 8, at 36-45, 79-80; Rebell, *supra* note 43, at 711-12.

61. Moreover, the police would not seek warrants to embroider an already strong case if, as Professor Dripps assumes, they only seek warrants when powerfully motivated by law enforcement considerations.

62. Dripps, *supra* note 1, at 925.

63. *Id.* at 926.

64. *Id.* at 927.

65. *Id.* at 925-26.

66. See Davies, *supra* note 16, at 617.

that the deterrent threat of the exclusionary rule is minuscule.⁶⁷ The efficacy of a meritorious motion has been so diluted by the Burger Court, independent of *Leon*, as to convert the exclusionary rule into chicken broth. The rule has no apparent function in any phase of any proceeding other than the prosecution's case-in-chief (and, sometimes, rebuttal) in the criminal trial itself.⁶⁸ Illegally seized evidence can be used to deny bail, to find probable cause for a bindover or an indictment,⁶⁹ to impose many disadvantages on a defendant (such as prejudicial press releases, anonymous and sequestered juries, and restrictions on contacts with witnesses); tainted evidence can also be used in sentencing, in revoking probation, in denying parole, and in denying court-appointed counsel on grounds that the accused can afford to hire his own.⁷⁰

The evidence can even be used to impeach the defendant if he testifies and, possibly, to impeach others who testify on the defendant's behalf.⁷¹ Illegal evidence can also be used in the prosecution's own direct case if the accused lacks standing⁷² or, though he has standing, the police had an "independent source" for the search,⁷³ or the connection between the illegality and the evidence is "attenuated."⁷⁴ And, of course, even if the evidence is admitted in flat violation of the exclusionary rule, it can't upset a conviction if the error was "harmless" which, under the Burger Court, it often is.⁷⁵ The utility of illegally seized evidence to the prosecution is enormous.

But the advantages of illegal searches do not end with their power to help put an accused in prison and keep him there. They can result in confiscation of contraband and, possibly, even cars and airplanes, which

67. Standing alone, this datum is consistent with an alternative explanation: The rule works; police are deterred by the exclusionary rule from conducting illegal searches and seizures. Professor Dripps and I both reject this possibility. For one thing, the law is too unclear to permit such accuracy of prediction. The police could not be 95% certain that *any* search is lawful.

68. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

69. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 88 (1985).

70. *Id.*

71. *United States v. Havens*, 446 U.S. 620 (1980) (impeachment of defendant who testified). *United States v. Hinckley*, 672 F.2d 115, 134 (D.C. Cir. 1982), declined to extend *Havens* to permit such impeachment of defendant's expert witness. That question, however, is still open to debate.

72. See *supra* note 15.

73. See *Segura v. United States*, 104 S. Ct. 3380 (1984). It is not clear whether the "inevitable discovery" exception of *Nix v. Williams*, 104 S. Ct. 2501 (1984), also applies to searches.

74. *United States v. Ceccolini*, 435 U.S. 268 (1978).

75. See generally W. LAFAVE & J. ISRAEL, *supra* note 69, at 1001-08. The Court also insulated state court decisions on search and seizure issues from federal habeas review in *Stone v. Powell*, 428 U.S. 465 (1976). It may soon accept the absurd argument in Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83, 93-94 (1967), that there is no incremental deterrent value in reversing a conviction on appeal where illegally obtained evidence has been admitted and that, therefore, there should be no reversal regardless of how harmful the evidence was. When that is done, the exclusionary rule will be gone.

the police can often use for themselves.⁷⁶ The evidence can also be used to deport an alien,⁷⁷ to impose tax deficiencies,⁷⁸ or to establish any other civil claim.⁷⁹ It can also be turned over to another country for use in its own prosecutions. Finally, when getting evidence is not the goal of the police, and it sometimes isn't,⁸⁰ the exclusionary rule is irrelevant.

If we add the deterrent effect of section 1983 civil actions and police discipline for unlawful searches, we probably do not add much. Police discipline is rare even for egregious violations of the Fourth Amendment,⁸¹ and successful section 1983 actions in search warrant cases are about as rare as police discipline.⁸² Thus, Professor Dripps is unquestionably correct on this point: Neither the exclusionary rule nor other sanctions could conceivably cause most warrants to be soundly based.

B. *The Labor Cost Alternative*

Professor Dripps concludes that the high "intrinsic" cost in getting a warrant causes police to seek only sound warrants.⁸³ In the NCSC study, this labor cost seems to have averaged about two to four hours, i.e., it took approximately that much time to prepare the affidavit, find a supervisor and/or a prosecutor to approve it, and present it to a magistrate.⁸⁴ The major causes of such time expenditures were apparently stenographical—the line officer often had to type the papers himself or herself⁸⁵—and logistical—prosecutors and magistrates were often in court, home in bed,

76. The Court held, in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), that the exclusionary rule applied in proceedings to forfeit a car that was used to transport narcotics. Although the narcotics need not be returned, their connection to the car must be proved by means that are not inconsistent with the exclusionary rule. Although never explicitly overruled, *Plymouth Sedan* has been gravely undercut by *United States v. Calandra*, 414 U.S. 338 (1974), and its progeny and may no longer be the law. See D. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 10.05 (8) (1985).

77. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

78. *United States v. Janis*, 428 U.S. 433 (1976).

79. Such is my interpretation of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

80. See Oaks, *Studying The Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, (1970); NCSC STUDY, *supra* note 8, at 99.

81. See Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 273 (1973). Judge Wilkey argues that there is no police discipline because of the exclusionary rule. Wilkey, *supra*, note 32, at 13-14, 28. However, there was no discipline before the exclusionary rule.

82. See Spiotto, *supra* note 81, at 272; see also *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971) (dismissing Fourth Amendment damages action because complaint did not allege that police actually knew probable cause was lacking).

83. Dripps, *supra* note 1, at 926.

84. The NCSC study did not observe or record the preparation time. It quoted anecdotes that it takes "a minimum of four hours" in one city and "three to four hours" in another. NCSC STUDY, *supra* note 8, at 94. Given the biased sources, these estimates are probably inflated. Telephone warrants, available in four of the cities, seemed to take about an hour and a half. *Id.* at 122.

85. *Id.*

or otherwise difficult to locate.⁸⁶ Although telephone warrants were authorized in several of the cities studied, they were not as easy as one might suppose. A prosecutor had to approve of the warrant and participate in its presentation, over the telephone, to the magistrate.⁸⁷ This entire process took about an hour and a half.⁸⁸

Professor Dripps believes that this labor cost is a significant deterrent to the seeking of warrants and that it alone guarantees that warrants will be sought only where the police officer has a strong belief in probable cause. Dripps also assumes that when there is such a belief, the officer is usually correct. He thus assumes that the police have only a single motive—getting important evidence of crime—and very considerable expertise in predicting where such evidence will be found. Both assumptions seem implausible; neither has empirical support.⁸⁹ But even if we accept such assumptions about police motivation and expertise, Professor Dripps' theory is fallacious.

The "cost" of a course of action has no significance in the abstract. A cost is significant in influencing choices only relative to costs and benefits of competing choices.⁹⁰ Police often conduct a search incident to arrest, which requires no warrant.⁹¹ But the costs are high. It takes time and trouble to locate the arrestee, to take him into custody, to transport him to jail, to process him there, to house and feed him. An arrest also involves a commitment of resources that are very substantial. The arrestee is entitled to a bail hearing, a probable cause determination if there has been no arrest warrant,⁹² an arraignment, counsel, and so forth.⁹³ The costs of arresting a suspect dwarf the costs of getting a search warrant. Yet police still use this method of search rather than a warranted search in most cases.⁹⁴

If Professor Dripps' theory were sound, he would, I think, have to agree that the costs of incident-to-arrest searches, being far higher than those of warrant searches, guarantee even more probable cause in such searches than in warrant searches.⁹⁵ *Leon's* good faith exception should

86. *Id.* at 68–69, 94–95.

87. *Id.* at 119–20.

88. *Id.* at 122.

89. See *supra* text accompanying notes 29–30.

90. Cf. G. STIGLER, *THE THEORY OF PRICE* 22–25, 31–33 (3rd ed. 1966).

91. *United States v. Watson*, 423 U.S. 411 (1975). There must, of course, be probable cause for the arrest. *Henry v. United States*, 361 U.S. 98 (1959).

92. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

93. Some of these costs might not be costs to the police, but most surely are, at least in part.

94. NCSC STUDY, *supra* note 8, at 21.

95. For some data pointing in the same direction, see *supra* note 58 and accompanying text. It could be argued that the entire cost of the arrest is not fairly allocable to the "incidental" search, since the arrest has purposes other than as an excuse to search. Often, however, that is not the case. See L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *supra* note 31, at 122. Even where it is, the purposes of

apply to such searches a fortiori. Indeed, it would seem that Professor Dripps would have to concede that there is no need whatever for a probable cause determination following arrest because the cost of making the arrest guarantees that there is probable cause behind it.

But Professor Dripps neither argues nor concedes these propositions. He would, I presume, be appalled by them. He emphatically asserts that *Leon*'s forgiveness of police mistakes should not be extended to warrantless searches, because this would risk "trivializing the Constitution"⁹⁶ and would discourage warrant searches.⁹⁷

Professor Dripps implicitly concedes that the "good faith" exception, even as he rewrites it, reduces the "cost" of a search. He thus implies that reducing the "costs" of a warrant search, but not other searches, is justifiable because of the need to encourage warrant searches.⁹⁸ But the "soundness," and hence the *relative* desirability, of warrant searches rests largely on their higher "intrinsic cost" relative to other methods of searching.

The other principal competitor to warrant searches is a search with "consent." That process involves no substantial commitment of resources. No one need be taken to jail, no more time need be taken than that necessary to obtain consent and carry out the search. There is an additional advantage in that consent searches may not involve the delay, and the consequent loss of evidence, that warrant searches do. Consent searches are often both cheaper and more advantageous, therefore, than their competitors in the search market. Police often resorted to consent searches in the NCSC study because they could coerce consent and get away with it.⁹⁹ If Professor Dripps' theory were sound, he would have to argue, I think, that courts should not only continue to blink when police lie about consent and continue to find consents voluntary although obtained by threats, they should even be more deferential to claims of consent, in order to maintain the relative costliness of warrant searches, so essential to their reliability as proxies for probable cause. But this, of course, would reduce incentives to use warrant searches, which Professor Dripps doesn't want to do.

Professor Dripps can't have it both ways: He can't encourage and discourage use of search warrants at the same time. Nor, more importantly, can his free-floating reference to the costs of the warrant process account for anything. Only by controlling the costs and benefits of all of the principal contenders in the search market can choices among them be influ-

the arrest and search are very similar (investigation and prosecution of criminals) and the justification is similar (probable cause). The argument may, therefore, be erroneous. In any event, it is hard to see why a substantial fraction of the costs of an arrest should not be allocated to the search.

96. Dripps, *supra* note 1, at 944.

97. *Id.* at 946.

98. *Id.*

99. See NCSC STUDY, *supra* note 8, at 21, 96-98.

enced, and only by analysis of the relative marginal costs and benefits of each can anything sensible be inferred from costs.

But there is an even more fatal flaw in Professor Dripps' theory. He has overlooked the major alternative to searches—investigation. An alternative to all modes of search is more police work: more interviewing of witnesses, more surveillance, more poring over documents, more informer recruitment, more of whatever police do, other than searching, to solve or create cases. Any search—whether a warrantless search, a “consent” search, or a warranted search—is undertaken because it appears to be the most efficient method of proceeding. Warrant searches may be used, for example, where an extended search is needed beyond that permitted by a search incident to arrest, and where consent appears unlikely or, though likely, may produce an unwelcome battle over its validity. If getting valid consent is doubtful, police may prefer to take the warrant route because an effort to obtain consent will, if unsuccessful, not only waste time but may make a warrant search useless because the police have tipped their hand. When, in any event, a warrant search seems, on a balance of marginal costs and benefits, to be preferable to any other method of searching, it will be undertaken if its marginal costs and benefits outweigh those of the only substitute, investigation. It would surely take only a very slight prospect of success for a warrant search to seem preferable to investigation. Hence, most warrant searches are *not* soundly based but are sought with nothing remotely like probable cause.¹⁰⁰

My major point is this: The relative marginal costs and benefits of alternative methods of search are important in determining why the police prefer one method over another, and altering them can influence choices of searching methods, but even such comparisons do not answer the question posed by Professor Dripps' thesis. There is no reason to believe that one method of searching consistently carries a higher degree of cause than another.¹⁰¹ This is because the method chosen, regardless of its costs in the abstract, exceeds in net utility all other methods of searching *and* the alternative of investigation.¹⁰² Indeed, the “cost” of a search cannot be mea-

100. I believe that the word “probable” in “probable cause” means “probable,” i.e., more likely than not. See *Brinegar v. United States*, 338 U.S. 160, 175–76. For a contrary argument, see Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984). If I am wrong on this, my conclusions lose some of their force but still stand.

101. Relatively minor intrusions, authorized by *Terry v. Ohio*, 392 U.S. 1 (1968), may be in a different category.

102. In any investigative situation, the relative costs and benefits of the four principal competitors (arrest searches, consent searches, warrant searches, investigation) can be rank ordered. There are sixteen possible orderings (ABCD, ACBD, BACD, etc.) Whichever method is at the top of the list when a decision is made will presumably be employed by “rational” police until the rankings become significantly reordered by circumstances; then there will be a shift to the method that has risen to the top of the ordering. Although, as a statistical matter, warrant searches are not often at the top of the list, I can see no reason why, when they *are* there, this signals unique motivations or strong “cause.”

sured by anything “intrinsic” to that search. Rather, the cost of the search is the net utility of the next best alternative, the foregone choice which was most competitive with the one selected.¹⁰³ The “intrinsic costs” of a method of searching are barely even relevant to the levels of motivation needed for the search, as is a cost versus benefit calculus of that method alone. Rather, there are two determinants: The net marginal utility of the method chosen (1) exceeds that of other search methods and (2) also exceeds or equals the utility of investigation that entails an equal cost. This point is quite low and requires no strong motivation.¹⁰⁴ The notion that there are special costs associated with a warrant search that tends to ensure probable cause is not only wrong empirically, it is wrong theoretically. It is not determinative that a warrant takes ten minutes rather than ten hours to get. Nor is it determinative that a policeman can push a button on a computer and get a warrant printed out or has to go through six layers of superiors, two prosecutors and three magistrates. The reliability of the warrant, as a predictor of probable cause, is not crucially

In comparison to searches incident to custodial arrests, for example, warrant searches invite “fishing expeditions” of a different and, in some cases, more significant magnitude than do arrest searches. While the police can look for anything in an arrest search, they cannot search beyond the person and the area of the arrestee’s “immediate control.” *Chimel v. California*, 395 U.S. 752 (1969). A warrant search, however, can cover houses, cars, garages, yards, offices, *and* persons. Because of its expanded scope, the warrant search, given the same amount of “cause,” is more likely to turn up something interesting. And police are not significantly restricted by the terms of the warrant in what they can seize. *See Anderson v. Maryland*, 427 U.S. 462 (1976). (In the NCSC STUDY, *supra* note 8, at 50, the police seized items not specified in the warrant in 35% of their searches.) Accordingly, it seems clear that *less* “cause” is often required to trigger a warrant search than for some other methods of search.

103. Cf. G. STIGLER, *supra* note 90, at 105–08.

104. Risk-neutral police will seek a search warrant if the expected marginal benefits exceed the expected marginal cost of a warrant. Since the marginal costs are usually low, the expected marginal benefits can also be small. In this context, the expected marginal benefit would seem to be a sum of several terms, say, $FUN + P(V)$, where FUN stands for the utility derived from searching with a warrant (banging on the door, yelling “Open up, we’ve got a warrant!” etc.) over and above the utility to be derived from other police activities, P is the increase in the probability of discovering evidence or contraband through the search as opposed to another way, and V is the utility of such evidence or contraband in a subsequent prosecution or other proceedings. The only thing related to probable cause is P, and it is related only indirectly. If P_w is the probability of discovering useful evidence in executing a search warrant, and P_o is the probability of discovering equally valuable evidence another way, then $P = P_w - P_o$. Thus, this theoretical model does not suggest that P_w needs to be substantial. If FUN is large, or if P_o is very small, the police might seek a warrant even though P_w is virtually zero—even though they know that there is almost no chance of finding any useful evidence.

FUN is often large. A home search can inflict embarrassment or pain on the searchees, and opportunities to confiscate or even to steal drugs, money or other valuables are substantial. Professor Dripps assumes that unless the police are interested primarily in obtaining admissible evidence, they have no incentive for obtaining a warrant. *See Dripps, supra* note 1, at 926–27. This is erroneous. The warrant not only facilitates access to premises, and sometimes, a confession when someone is there, it authorizes a forcible entry. It also provides a cloak of immunity in marginal cases, and did so even before *Leon*. *Id.* at 936 n.158. The police in the NCSC study sought, and got, warrants that they knew were illegal. *See NCSC STUDY, supra* note 8, at 108–10.

affected by the labor cost to the policeman.¹⁰⁵ The warrant is in any event the most efficient choice available. Any proposal that draws inferences about strong probable cause from the costs associated with a search method is dangerous and ill-considered.

C. *The Bearing of Investigation on Probable Cause*

Professor Dripps argues that investigative effort by the police should be counted, over and above the evidence such investigation produces, toward probable cause—at least when determining the validity of a search warrant.¹⁰⁶ This is because Professor Dripps considers investigative effort as part of the “cost” of getting a search warrant.¹⁰⁷ If police were required to stand before the magistrate on one leg for an appropriately painful and otherwise wasteful period of time as a condition of getting a search warrant, there might be something in Professor Dripps’ theory. But investigation is very different. It is a method of gathering evidence that may generate a confession and surrender, a consent search, an arrest and incidental search, a warrant search or abandonment of the investigation. As I have pointed out, it is more soundly viewed as an alternative to a warrant search rather than as a cost thereof.

There is a sense, however, in which investigative effort might have a bearing on Professor Drupp’s theory. Under the theory, work toward the warrant evidences strong motivation, strong motivation evidences firm belief in cause, and firm belief evidences probable cause. If the source of the motivation, however, is something other than the facts constituting cause, the inferential rocket never gets off the pad. The more effort the police put into an investigation of a matter, all other things being equal, the greater the utility in seeking a warrant. The police will have made a larger investment in the case and will perceive that they stand to lose more by a fruitless investigation.¹⁰⁸ Hence, their greater willingness to

105. This is not to say that a process that includes review by superiors, prosecutors and magistrates would be no more likely to result in sound warrants than one that involves little layering of potential screens. But whatever qualitative improvement in the warrants resulted would not be attributable to the fact that the screening consumed police time. Rather, one or more of the screens might know something about probable cause and care about the Constitution. The screens also could decide that, although probable cause seems to be present, the case is still too weak, even with its anticipated benefits from the search, to warrant prosecution or, though the case seems factually strong, it is not the kind of case that should be prosecuted. Such exercises of negative prosecutorial discretion could indirectly contribute to the existence of probable cause in the surviving warrants. Unfortunately, there is little evidence in the NCSC study that any of the latter criteria are routinely applied by the pre-warrant screens.

106. Dripps, *supra* note 1, at 930, 932–33.

107. *Id.*

108. This is bad economics on their part, but it reflects a nearly universal psychological propensity.

search on mere suspicion. The inference of probable cause is undermined rather than strengthened.

III. POLICE BEHAVIOR AS A PROXY FOR PROBABLE CAUSE

Although Professor Dripps has not correctly identified them, it is conceivable that a condition or set of conditions associated with the warrant process could correlate positively with the existence of probable cause. But even if these conditions could be isolated in an aggregate of past cases, I have the gravest doubt that such data could legitimately be used to find probable cause in a particular case.¹⁰⁹

There is a large and learned body of literature disputing the propriety of inferring a fact in a legal dispute from probabilistic data.¹¹⁰ The type of question usually debated by the statistical scholars is whether it is appropriate, when no other evidence is available, to conclude that the defendant's bus was the one involved in an accident merely from the fact that the defendant operated three-fourths of the buses in the area. Even if the right answer to this question is yes, it does not follow that probable cause for a search should be found in a particular case because fact X was present and fact X in the past correlated very positively with probable cause.

Assume fact X is two hours of work by a policeman in obtaining a warrant. Assume that in three-fourths of the cases in which such time was put in, in the recent past, there was probable cause. Disregard alternative explanations, problems of sorting out coincidence from cause, and all possible changes in circumstance that might have occurred since the data were compiled. The cases still are not analogous.

In the bus hypothetical, the data merely support an inference in the absence of more particularized information. The statistical inference can be destroyed by the defendant if evidence is available with which to do so, and it usually will be available. What Professor Dripps proposes, however, is to freeze a very weak, easily rebutted statistical inference into a rule of law. There is no way that a person who was searched could prevent a finding of probable cause under Professor Dripps' approach. The two hours of work is probable cause, or very nearly that.¹¹¹

109. These conditions would not be reliable predictors of future probable cause unless all conditions having a causal relationship, negative and positive, remained constant or all changed in equilibrium. The factual and legal combinations surrounding the warrant process, however, are almost infinite in their number and fluidity. To find a set of conditions in the warrant process that are causally connected to probable cause and to monitor their relationships with all other likely contributors is, or would seem to be, a near impossibility.

110. See MCCORMICK ON EVIDENCE, *supra* note 43, at 646-56; Brillmayer & Kornhauser, *Review: Quantitative Methods and Legal Decisions*, 46 U. CHI. L. REV. 116 (1978); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). But see Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34 (1979).

111. Presumably, Professor Dripps would require *some* facts concerning the suspect, but it is not

Another important difference between the bus hypothetical and the present problem is that the facts that generate the statistical inference in the bus case are in place before the dispute arises and are not manipulable by the parties. The bus company would hardly change the number or color of buses it operates to avoid the virtually unforeseeable, minuscule risk that an unidentified bus would be involved in an accident. If, on the other hand, two hours of police work were to be treated as the equivalent of probable cause, a police officer who had *no* cause could easily destroy constitutional rights by putting in two hours of work to get the warrant. Constitutional rights could be bought very cheaply.¹¹² Professor Dripps concedes this, but argues that "policy must speak to the ordinary and not the exotic case."¹¹³ In the present context, I disagree. The law of evidence generally excludes as worthless evidence pointing to an inference if it was created by the offeror "with an eye to the litigation."¹¹⁴ I think that approach is sound and I would apply it not only to Professor Dripps' proposal but to any suggestion that we infer probable cause, or guilt, or anything else detrimental to an accused, from behavior of the police in a particular case.

IV. CONCLUSION

United States v. Leon was merely a mild progression in the process of gutting the Fourth Amendment (or, if you prefer, the exclusionary rule) which began more than a decade ago with *United States v. Calandra*.¹¹⁵ Even before *Leon*, there were so many incentives to conduct unconstitutional searches and so few disincentives to do so, that little was left of the exclusionary sanction. *Leon's* significance is largely symbolic. In that sense, although not for his reasons, I agree with Professor Dripps that *Leon* "poses only a minor risk of encouraging speculative search warrants."¹¹⁶ The major encouragements were already in place before *Leon*.

What disturbs me about Professor Dripps' effort to rationalize and revise *Leon*, therefore, is not so much that his revision is unintentionally

clear that his theory would require any.

112. If careful track were kept of the relationship between police time and probable cause, the policeman who "faked" cause by putting in two hours of makework would pay a small price in addition to his time for having done so, because she would slightly alter the statistical patterns. But Professor Dripps does not propose that there be any such monitoring and I cannot conceive of its feasibility. What would be the validating measure of probable cause in a system that accepted police effort as its equivalent?

113. Dripps, *supra* note 1, at 926 n.118.

114. See *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943); MCCORMICK ON EVIDENCE, *supra* note 43, at 827, 837, 841, 876-77.

115. 414 U.S. 338 (1974) (illegally obtained evidence can be used by grand jury because "incremental deterrent value" of exclusion not worth the cost).

116. Dripps, *supra* note 1, at 923.

even more destructive of the exclusionary rule than the “good faith” exception, but that his misapplication of price-theory to search warrants could easily be extended not only to all other areas of Fourth Amendment activity but to virtually every cranny of criminal procedure. If an effort “cost” in a particular phase of the criminal process were to be considered a proxy for some fact essential to the constitutional validity of that phase of the process, it is hard to see an end to that tunnel under the Bill of Rights. If search warrants are valid because they take the police two hours to get, why shouldn’t an accused be guilty because it took two *weeks* to process his case? Even if Professor Dripps’ economic analysis of search warrants were sound, it would still have little or no legitimate place in the criminal process.

I nonetheless applaud Professor Dripps and others who have pulverized the Court’s opinion in *Leon*. The major solution to Fourth Amendment opinions that make no sense, however, is not to revise the opinions with more plausible rationales but to confront the root problem—judicial hostility to the Fourth Amendment.

Unless the Court can be persuaded that *Calandra*’s incremental-deterrence-has-no-value approach is wrong, its continued application will ultimately produce the conclusion the Court began to construct in *Calandra*: There is so little left of the exclusionary rule, it makes no sense to retain it; its application is about as arbitrary and unpredictable, depending on your perspective, as being struck by lightning or winning the lottery. *Leon* almost gets us there.